Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

PAUL J. KIEL,

Petitioner,

v.

SELECT ARTIFICIALS, INC.,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in ruling that employers can fire employees for protesting what they reasonably believe to be unlawful discrimination merely because they express their protest in an upset or frustrated manner in response to the alleged discrimination which the employer perceives as insubordinate?

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, handed down on March 4, 1999, is officially reported at 169 F.3d 1131 (8th Cir. 1999) (en banc). A copy of the Opinion is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on March 4, 1999. Plaintiff Kiel did not file a petition for rehearing since the case was heard and decided by the Court sitting en banc. The jurisdiction of the U.S. Supreme Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

Section 503 of the Americans with Disabilities Act provides that "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter . . ." *See* 42 U.S.C. §12203(a).

STATEMENT OF THE CASE

Plaintiff Kiel has been profoundly deaf since birth. He cannot hear any sound, including the sound of his own voice. He worked for Defendant for two years, competently and satisfactorily performing his job as billing clerk. From time to time during these two years, Mr. Kiel informally asked Defendant to accommodate his disability in two ways. First, he asked Defendant to purchase an inexpensive telecommunications device, known as a TDD, so that he could make and receive personal and business telephone calls like the hearing employees could. Second, he asked Defendant to provide him with an interpreter so that he could understand what was going on at staff meetings and other employee gatherings and participate in them like the hearing employees could. Defendant did not act on his requests.

On the morning of the day he was fired, Mr. Kiel formally asked Julie Fry, one of the two owners of Defendant, to purchase a TDD for him and the other two deaf employees who worked for Defendant. He explained why a TDD was necessary, that the Americans with Disabilities Act required it, that it cost only $230, and that the company could get a tax deduction for it. As he was explaining all this, Ms. Fry kept shaking her head and saying "No." Mr. Kiel requested an interpreter so that he could discuss the matter with Robert Fry, the other owner of Defendant. Ms. Fry continued to shake her head "No." Upset and frustrated, Mr. Kiel briefly raised his voice and said, "you're selfish, you're selfish." Shortly after this incident, Ms. Fry handed Mr. Kiel a note which said "Did you know that you yelled at me?" Mr. Kiel explained that he did not realize he had raised his voice and immediately apologized for doing so. Ms. Fry appeared to accept his apology. At the end of the work day, however, Ms. Fry terminated Mr. Kiel for insubordination and eventually replaced him with an employee who was not deaf.[1]

Mr. Kiel brought this lawsuit alleging, among other things, a retaliation claim under the Americans with Disabilities Act (ADA). He alleged that Defendant fired him because he protested what he believed in good faith to be a violation of the ADA — Ms. Fry's refusal to supply a TDD as a reasonable accommodation for his disability. The district court granted summary judgment against Mr. Kiel. On appeal, a divided Eighth Circuit Court of Appeals, sitting en banc, upheld the summary judgment by a nine to four vote.

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[1] Defendant contends that Mr. Kiel slammed his desk drawer. If he did, it could not have been very hard since only one of the four employees in the vicinity testified she heard it, and Ms. Fry never said anything to Mr. Kiel at the time, or in her contemporaneous documentation of the incident, about it. Also, Defendant claims that Mr. Kiel uttered a remark about Ms. Fry buying herself a new car. However, Ms. Fry did not testify that she heard Mr. Kiel's statement, assuming it was made, let alone that she relied on it in terminating him.

According to the majority, Mr. Kiel's retaliation claim failed because Ms. Fry fired him, not because he protested unlawful discrimination, but because of the manner in which he protested it. Appendix at A-7. The Court characterized his protest as "rude" even though it was provoked by Ms. Fry's own rude refusal to even consider his request for a TDD — a request that it is undisputed he made in a polite and respectful manner. The majority held that (1) the form, as opposed to the substance, of an employee's protest is not protected from retaliation in an employment discrimination case; (2) even if it is protected, the employer's opinion as to whether the form of the employee's protest was reasonable, or went too far, is decisive and binding on courts and (3) even if the employer's opinion is subject to judicial review, Mr. Kiel's conduct was unreasonable and excessive as a matter of law. Appendix at A-7 – A-8.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

Several federal appellate courts have established three basic principles governing retaliation claims brought under the employment discrimination laws. First, employees are protected from retaliation for the form, as well as the substance, of their protests when they challenge what they reasonably believe to be unlawful discrimination by their employers. Second, they forfeit this protection only if the employer can show that the way they expressed their concern about possible discrimination was unreasonable under the circumstances, i.e. extreme and excessive. This test is designed to allow employees some leeway in how they express their protests, given the reality that they are often frustrated or upset about the discrimination and that their protests beneficially aid in the enforcement of the statute by bringing such discrimination to light. Third, the question whether the form of the employees' protests was reasonable or went too far is a fact-sensitive one which ordinarily should be answered by a jury following a trial rather than by a court on a motion for summary judgment.

The Eighth Circuit's decision contradicts all three principles and clashes with the federal appellate court decisions which have established them. In addition, it undermines the policies and purposes of the anti-retaliation provisions of the employment discrimination laws in a way Congress could not have intended or endorsed.

A.

The Eighth Circuit stated that Ms. Fry did not fire Mr. Kiel because he challenged her refusal to accommodate his disability. Rather, she fired him because of the *way* he challenged her refusal to accommodate his disability. According to the Court, the form as distinct from the substance of an employee's protest is not safeguarded from retaliation by an employer. Appendix at A-7. Other

federal appellate courts, however, have disagreed. They have held that an employer cannot fire an employee because of the way he chooses to express his opposition to an unlawful employment practice unless it is extreme and excessive under the circumstances. *See, e.g., Payne v. McLenore's Wholesale & Retail Stores,* 654 F.2d 1130, 1142, 1144 (5th Cir. 1981); *EEOC v. Crown Zellerbach Corp.,* 720 F.2d 1008, 1014-1015 (9th Cir. 1983). The employer must carry the burden of showing that the form and manner of the employee's protest was "so generally inimical to his employer's interests, and so excessive, as to be beyond the protection" of the anti-retaliation provisions of the law. *Hochstadt v. Worcester Foundation,* 545 F.2d 222, 230 (1st Cir. 1976); *see also Jennings v. Tinley Park,* 796 F.2d 967-968 (7th Cir. 1986); *Wrighten v. Metropolitan Hosp.,* 726 F.2d 1346, 1354 (2nd Cir. 1984).

Heedless of this case law, the Eighth Circuit held that the substance of an employee's protest is protected from retaliation but not how he elects to express it. This artificial distinction cannot be justified and will have significant harmful consequences. It will open a loophole allowing employers to fire employees with impunity simply because they are offended by the passion or intensity with which the employees express their opposition to unlawful employment practices. The unchecked power they will have to fire employees who complain in a vigorous way about discrimination will send an intimidating message to the rest of the workforce that they, too, had better not complain about discrimination. Such a result runs counter to the goal of anti-retaliation legislation which is to encourage employees to assert claims of discrimination without fear they will lose their jobs. It also chills the free and frank exchange of views between employees and employers — an exchange which, although it may sometimes unavoidably bruise sensibilities on both sides, is generally advantageous because it helps to promote the proper consideration and resolution of meritorious claims of discrimination.

B.

The Eighth Circuit held that the employer's subjective view as to whether the employee went too far in the way he expressed his challenge to its employment practices is immune from judicial scrutiny and review. Specifically, it stated that in the absence of any evidence that Ms. Fry fired Mr. Kiel because he complained about her refusal to spend $230 to purchase a TDD, as opposed to the way he complained about it by briefly raising his voice and suggesting she was selfish for refusing to spend the money, "it is not the prerogative of the courts or a jury to sit in judgment of employers' management decisions." Appendix at A-7. Common sense dictates, however, that the employer's view cannot be decisive because, if it was, there would never be anything for a jury to decide and the employer's conduct would be unconstrained and unreviewable. The employer would escape liability simply because it believed that the employee's protest was excessive and injurious, even if a jury could reasonably find that it was not. Federal appellate courts in other jurisdictions have rejected such an approach, holding that it is the employer's burden to persuade the trier of fact that the form and manner of the employee's protest was excessive and unprotected. If it fails to carry this burden, it can be held liable for retaliation. *Payne,* 645 F.2d at 1142, 1144; *Jennings,* 796 F.2d at 968; *Hochstadt,* 545 F.2d at 234 n.8. This stands to reason, since if the form of the employee's protest was not so excessive or injurious as to be unprotected, but the employer nevertheless fires him for it, the employer has fired the employee because of his protected activity and the employee is entitled to prevail on his retaliation claim.

Even assuming the employer's assessment of the reasonableness of the employee's conduct is judicially reviewable, the Eighth Circuit believed that Mr. Kiel's protest was unreasonable as a matter of law, characterizing it as angry, abusive, derogatory and rude. Appendix at A-7. But a jury could readily conclude that the means by which Mr. Kiel challenged Ms. Fry's refusal to

accommodate his disability was not extreme and excessive for five reasons.

First, merely saying "you're selfish" did not rise to the level of the kind of egregious expression that would place Mr. Kiel outside the protection of the ban on retaliation. The candid truth is that Ms. Fry *was* acting selfishly when she refused to consider spending what the drafters of the ADA called a "nominal sum" of money to purchase a TDD for Mr. Kiel and the other two deaf employees. S. Rep. No. 116, 101st Cong.; 1st Sess. at 36 (1989). It is precisely this kind of self-regarding conduct on the part of an employer, which pays insufficient attention to the needs of employees with disabilities, which the ADA prohibits. Mr. Kiel was challenging Ms. Fry's unlawful conduct under the ADA when he aptly characterized it as "selfish" and, as a result, was engaged in protected activity under the opposition clause of the ADA.[2]

Second, although Mr. Kiel raised his voice to Ms. Fry, he did so only briefly. Due to his deafness, he did not realize he raised his voice and immediately apologized to Ms. Fry when he found out he did. Even if he was a hearing employee, moreover, the mere fact that Mr. Kiel briefly raised his voice to Ms. Fry — for the one to two seconds it took him to say "you're selfish" to her — does not mean his conduct was unprotected as a matter of law. Federal appellate courts have recognized that it is inevitable that employees will sometimes raise their voices when they are challenging employment practices that they sincerely believe are unlawful, and employers must refrain from retaliating against

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[2] Doubtless Ms. Fry resented Mr. Kiel's criticism of her conduct, all the more so because there was merit to it. One is reminded of H.L. Mencken's observation that "injustice is relatively easy to bear; what stings is justice." Although her self-esteem may have been injured by Mr. Kiel's criticism, Ms. Fry was not entitled to react (overreact) by retaliating against him in the harshest way she knew how — by depriving him of his job.

them by firing them unless their conduct is plainly egregious, which it was not here. *NLRB v. Chelsea Laboratories, Inc.*, 825 F.2d 680, 682 (2d Cir. 1987); *Ramirez v. Glass*, 615 F.2d 163, 169-170 (5th Cir. 1980); *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 182 n.8 and 183 (8th Cir. 1975).

Third, Mr. Kiel's protest did not cause any disruption, let alone any significant disruption, in the operation of Defendant's business. *EEOC v. Crown Zellerbach*, 720 F.2d at 1015. The few employees who overheard it briefly looked up, turned around to see what was happening, and then immediately went back to work. They testified they paid no attention to it. There is no evidence that Mr. Kiel's conduct impeded or delayed work or caused any morale or discipline problems in the workplace. Any disruption of the work environment was de minimis and inconsequential.

Fourth, Mr. Kiel's conduct was spontaneous, not calculated, and an isolated one-time occurrence.

Fifth, Ms. Fry provoked Mr. Kiel's "excessive expression" by her own unlawful conduct. It has long been settled under a variety of federal statutes that an employer may not provoke an employee by its improper conduct and then rely on the employee's intemperate response as a basis for discharging him. *O'Connor v. Peru State College*, 781 F.2d 632, 637 (8th Cir. 1986) (Title VII); *Ramirez*, 615 F.2d at 169-170 (42 U.S.C. §1981 and §1983); *NLRB v. Mueller Brass Co.*, 50 F.2d 680, 686 (5th Cir. 1974) (National Labor Relations Act); *Brennan*, 513 F.2d at 183 (Fair Labor Standards Act). Ms. Fry's conduct was unlawful because she adamantly refused to even consider Mr. Kiel's request for a TDD, repeatedly telling him "No" when he tried to explain why such a device was a required accommodation under the ADA. In so doing, Ms. Fry failed to engage in the good faith "flexible, interactive" dialogue with Mr. Kiel which the ADA mandates whenever an employee requests an accommodation

for his disability. 29 C.F.R. §1630.9, Appendix. As Judge Posner has observed, "the duty of reasonable accommodation requires more than a willingness on the part of the employer to listen to the employee's suggestions as to how the workplace might at reasonable cost be adapted to the employee's disability . . . the employer must make a reasonable effort to explore the possibilities." *Miller v. Ill. Dept. of Corrections,* 107 F.3d 483, 486 (7th Cir. 1997). Here, Ms. Fry was unwilling to do either.

Not surprisingly, Mr. Kiel became frustrated and, momentarily raising his voice, told Ms. Fry she was selfish for refusing to spend $230 to accommodate his disability and that of the other two deaf employees. If Mr. Kiel's reaction was somewhat intemperate, it was also understandable and excusable under the circumstances, incited and provoked as it was by Ms. Fry's unlawful refusal to comply with the requirements of the ADA. "An employer cannot provoke an employee to a point where he commits an indiscretion. . . and then rely on this to terminate his employment." *NLRB v. Mueller Brass Co.,* 501 F.2d at 686; *see also Ramirez,* 615 F.2d at 169-170. The Eighth Circuit's decision is disturbing because it encourages an employer to turn a deaf ear to an employee's good faith expression of concern about possible discrimination — refusing to even listen to it — knowing that if the employee responds in a predictably upset or frustrated manner it can fire the employee and escape liability for it.

Given these five considerations, a jury could reasonably conclude that the form and manner of Mr. Kiel's protest of Ms. Fry's refusal to accommodate his disability was not so unreasonable as to justify his dismissal as a matter of law. Notably, the Eighth Circuit was unable to cite a single case in its opinion — not one — where conduct as mild and inconsequential as Mr. Kiel's was held to be unprotected as a matter of law. Indeed, federal appellate courts have held that much more

insubordinate and disruptive conduct is protected under the analogous anti-retaliation provisions of Title VII and the National Labor Relations Act. *See, e.g., EEOC v. Crown Zellerbach,* 720 F.2d 1008, 1014 (9th Cir. 1983) (writing letter to one of the employer's biggest customers alleging that the employer was guilty of pervasive racism); *Wrighten,* 726 F.2d at 1357 (holding press conference to publicly criticize hospital's claimed mistreatment of black patients); *Payne,* 654 F.2d at 1136-1137 (9th Cir. 1984) (boycotting and picketing of employer); *Grant v. Hazelett Strip-Casting Corp.,* 880 F.2d 1564, 1569-1570 (2d Cir. 1989) (drafting a memo containing evidence of age discrimination, asking the company president to approve the memo without revealing its true purpose, and then using the signed memo in a subsequent lawsuit against the company); *Reef Industries, Inc. v. NLRB,* 952 F.2d 830, 833 (5th Cir. 1991) (accusing supervisor of low intelligence); *NLRB v. Chelsea Laboratories, Inc.,* 825 F.2d 680, 682 (2d Cir. 1987) (accusing president of trying to "push things down people's throats"); *NLRB v. Max Factor & Co.,* 640 F.2d 197, 200 (9th Cir. 1980) (accusing supervisor of "kissing ass" and being a "big phoney"); *Dreis and Krump Mfg. Co., Inc. v. NLRB,* 544 F.2d 320, 328-29 (7th Cir. 1976) (accusing supervisor of "malice, gross negligence, carelessness and dissembling").

C.

The Eighth Circuit's willingness to decide for itself whether Mr. Kiel's protest was extreme and excessive, without regard to what a jury might reasonably think, trespasses on the role of the juries in retaliation cases. The forms which expressive protest can take are richly diverse. As a result, federal appellate courts have held that the question whether particular opposition conduct by an employee is protected from retaliation, or went too far and thus is grounds for termination, is a fact-sensitive one which ordinarily cannot be resolved on a motion for summary judg-

ment. *Wrighten,* 726 F.2d at 1355; *Grant,* 880 F.2d at 1570. As the Fifth Circuit has observed, it is for a jury, not a court, to "hear evidence, to balance the competing considerations, and to reach a conclusion as to the reasonableness of the [employee's] conduct." *Payne,* 654 F.2d at 1146.

D.

A final point. The Eighth Circuit seemed to suggest it would be somehow unfair or unjust to hold Defendant liable for firing Mr. Kiel when it has a good record of hiring deaf employees. Appendix at A-7. But an employer does not purchase immunity from the requirements of the ADA merely because it hires a few deaf employees. It has a continuing obligation under the law to reasonably accommodate the needs of those employees and to refrain from retaliating against them when they challenge, in a non-excessive and non-extreme way, its refusal to accommodate those needs. Moreover, the Eighth Circuit's suggestion betrays an inadequate appreciation of reality. In the real world, it is common for some employers to hire a few deaf people and then refuse to accommodate their disability because it costs them time, effort or money. *See, e.g., McAlister v. Mo. Div. of Employment,* 747 S.W.2d 661, 667 (Mo. App. 1988). The attitude of these employers seems to be that deaf people should count themselves lucky to have jobs and should not be so ungrateful as to insist on equal treatment with the hearing employees, even though the ADA requires such treatment whenever feasible. 42 U.S.C. §12112. A jury could conclude that Defendant is such an employer. It was willing to hire a few deaf people but unwilling, for at least two years, to provide an interpreter or a TDD to them. It was only after it fired Mr. Kiel and faced the prospect of a lawsuit that Defendant belatedly supplied a TDD (but not an interpreter) to its deaf employees. Ruth Sullivan, one of these deaf employees, testified that she thought she got a TDD at this time because "Maybe she [Ms. Fry] was afraid of a lawsuit."

CONCLUSION

The U.S. Supreme Court should review this case because it raises important issues concerning the scope and meaning of the anti-retaliation provisions of the employment discrimination laws. Is the form, as well as the substance, of an employee's expressive protest protected from retaliation? What kind of opposition conduct is protected as a matter of law? What kind of opposition conduct is unprotected as a matter of law? How narrow or broad is the range of cases in between? What factors and considerations are relevant in determining whether expressive protest is protected from retaliation? Which are most important? Which are least important? Who decides? A jury? A judge? The employer itself? Significantly, the U.S. Supreme Court has never addressed any of these issues even though they reoccur on a regular basis in cases brought in the lower federal courts. Because the Eighth Circuit has made rulings in this case which are at odds with other Circuits and which, if allowed to stand, will thwart the purposes of the anti-retaliation provisions of the employment discrimination laws, Plaintiff Kiel asks the Court to grant his petition for certiorari to review it.

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APPENDIX

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-2433

Paul J. Kiel,
Appellant,

Appeal from the United States v.
District Court for the Eastern District of Missouri.

Select Artificials, Inc.,
Appellee.

Submitted: September 23, 1998
Filed: March 4, 1999

Before BOWMAN, Chief Judge, HEANEY, BRIGHT, McMILLIAN, RICHARD S. ARNOLD, FAGG, WOLLMAN, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, MURPHY, and KELLY,[1] Circuit Judges, En Banc.

WOLLMAN, Circuit Judge.

Paul Kiel brought this suit under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.010 *et seq.*, against his employer, Select Artificials, Inc. (Select). The district

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[1] The Honorable John D. Kelly died on October 21, 1998. This opinion is consistent with his vote at the conference following argument on September 23, 1998.

court [2] granted summary judgment in favor of Select on all claims. Kiel appealed, and a divided panel of this court reversed and remanded for trial. *See Kiel v. Select Artificials, Inc.*, 142 F.3d 1077 (8th Cir. 1998). We granted Select's petition for rehearing en banc, vacating the panel opinion. We now affirm the decision of the district court.

I.

Kiel has been deaf since birth. He was employed at Select as a billing clerk from January 1992 to February 1994. On several occasions he requested that Select purchase a telecommunications device (TDD) that would enable him to make business and personal telephone calls. Select did not provide the device because Kiel did not need it to perform his duties as a billing clerk. Although hearing employees occasionally communicated with clients by telephone, Select decided that Kiel's supervisor could make client calls for him when they were needed. Kiel was allowed to make personal calls during breaks on those occasions when he brought his TDD from home.

Kiel also requested that Select provide him a sign-language interpreter for staff meetings and social gatherings. Select did not normally provide an interpreter because one was not needed to enable Kiel to perform his job duties. On one occasion, however, Kiel requested an interpreter prior to a training session related to his position, whereupon Select provided one for him.

On February 17, 1994, Kiel photocopied a letter that he had drafted to Robert Fry, co-owner of Select, again requesting that the company purchase a TDD. After observing Kiel at the photocopier, Julie Fry, the other co-owner of Select, approached him at his work station to inquire about his use of the copier. Kiel

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[2] The Honorable Terry I. Adelman, United States Magistrate Judge for the Eastern District of Missouri, who presided over the case by consent of the parties pursuant to 28 U.S.C. § 636(c).

informed Ms. Fry that he was requesting that the company purchase a TDD. She told him that Select would not purchase the device. Visibly frustrated and upset, Kiel shouted at Ms. Fry, "You're selfish, you're selfish." He then slammed his desk drawer, and as Ms. Fry walked away he made a remark about her recent purchase of a new automobile. Four other employees were present when Kiel did this. According to the employee witnesses, the episode lasted "a few minutes."

Later that day, Ms. Fry asked Kiel if he realized that he had yelled at her in front of other employees. He said that he was not aware that he had raised his voice and apologized for doing so. After conferring with Mr. Fry, Ms. Fry decided to terminate Kiel for insubordination despite his apology.

Kiel raised claims of discriminatory discharge, retaliatory discharge, and failure to accommodate under the ADA and the MHRA. The district court concluded that Kiel did not produce evidence showing that Select's non-discriminatory reason for terminating Kiel, insubordination, was pretextual. It also held that the temporal connection between Kiel's letter requesting a TDD and his termination was insufficient to demonstrate retaliatory intent and that Select had not failed to accommodate Kiel.

II.

We review a grant of summary judgment de novo. *Price v. S-B Power Tool*, 75 F.3d 362, 364 (8th Cir.), *cert. denied*, 519 U.S. 910 (1996). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, we view the evidence and draw all justifiable inferences in favor of the nonmoving party. *See Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 (8th Cir.), *cert. denied*, 118 S. Ct. 441 (1997).

In an employment discrimination case, the plaintiff must initially present a prima facie case to survive a motion for summary judgment. *See Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1310 (8th Cir. 1995) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973)). The employer must then rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for the adverse employment action. *See Lidge-Myrtil*, 49 F.3d at 1310. If the employer does this, the burden of production shifts back to the plaintiff to demonstrate that the employer's non-discriminatory reason is pretextual. *Id.* at 1311.

To make out a prima facie case under the ADA, Kiel was required to show that he is disabled within the meaning of the ADA, that he is qualified to perform the essential functions of his position, and that he suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination. *Price*, 75 F.3d at 365. Generally, evidence that a plaintiff was replaced by a similarly situated employee who is not disabled is sufficient to support an inference of discrimination. Id. Select did not dispute that Kiel was disabled or that he was qualified to perform his duties as billing clerk, and Kiel established that he was replaced by a hearing employee. Thus, Kiel met his initial burden under *McDonnell Douglas*.

The burden of production then shifted to Select to articulate a legitimate, non-discriminatory reason for Kiel's termination. Select stated that it terminated Kiel because he insulted Ms. Fry, slammed his desk drawer, and made a sarcastic remark about Ms. Fry in the presence of four co-workers. Our cases have repeatedly held that insubordination and violation of company policy are legitimate reasons for termination. *See Ward v. Procter & Gamble Paper Prods. Co.*, 111 F.3d 558, 560 (8th Cir. 1997) (employee terminated for striking a co-worker); *Price*, 75 F.3d at 365-66 (employee terminated for excessive absenteeism); *Lidge-Myrtil*, 49 F.3d at 1310-11

(employee not chosen for promotion because of poor relationship with co-workers and violation of company policy); *Miner v. Bi-State Dev. Agency*, 943 F.2d 912, 913- 14 (8th Cir. 1991) (employee terminated for insubordination and violating various company policies).

Select having proffered a non-discriminatory reason for terminating Kiel, the burden shifted to Kiel to present evidence that Select's reason was pretextual. *See Lidge-Myrtil*, 49 F.3d at 1311. In essence, Kiel was required to show a genuine issue of material fact as to whether Select actually fired him because of his disability. *Id.* Although it is possible for strong evidence of a prima facie case to also present a factual issue on pretext, *see Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1333-37 (8th Cir. 1996), the ultimate question is whether the plaintiff presents evidence of "conduct or statements by persons involved in [the employer's] decision-making process reflective of a discriminatory attitude sufficient to allow a reasonable jury to infer that that attitude was a motivating factor in [the employer's] decision to fire [the plaintiff]." *Feltmann v. Sieben*, 108 F.3d 970, 975 (8th Cir. 1997) (citing *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 345 (8th Cir. 1996)).

Kiel did not submit any evidence of pretext in this case. He relied entirely on his prima facie case to challenge Select's non-discriminatory reason. The bare assertion that Select hired a hearing employee to replace Kiel did not raise a genuine factual issue regarding Select's discriminatory intent, for Kiel did not point to any conduct or statements by the Frys that would permit a reasonable jury to find that insubordination was a mere pretext for his termination. Nor did he demonstrate that the Frys disciplined hearing employees less severely for insubordinate conduct. As for Kiel's assertion that he did not realize he was shouting, he himself testified that "If I want to shout, I shout," which is consistent with the co-workers' testimony that they had never heard him raise his voice. In short, there is simply no

evidence that discrimination was a motivating factor in Kiel's termination.

Kiel contends that his discriminatory discharge claim falls within the mixed-motive analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248-50 (1989). To trigger *Price Waterhouse* analysis, however, a plaintiff must show that "an impermissible motive played a motivating part in an adverse employment decision." *Id.* at 250. We have interpreted this to require a plaintiff to present, at a minimum, some direct evidence of discriminatory motive. *See Thomas v. First Nat'l Bank*, 111 F.3d 64, 65-66 (8th Cir. 1997); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 780-81 (8th Cir. 1995). Because Kiel relied entirely on circumstantial evidence to establish the existence of a discriminatory motive on Select's part, the district court was correct in reviewing Kiel's claim solely under the *McDonnell Douglas* framework. In light of Kiel's failure to establish a genuine factual issue on pretext, the district court properly granted Select summary judgment on the discriminatory discharge claim.

III.

To present a prima facie case of retaliation, a plaintiff must show that he engaged in protected conduct, that he suffered an adverse employment action, and that the adverse action was causally linked to the protected conduct. *See Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997); *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98, 100 (8th Cir. 1995). Although contesting an unlawful employment practice is protected conduct, the anti-discrimination statutes do not insulate an employee from discipline for violating the employer's rules or disrupting the workplace. *See Evans*, 65 F.3d at 102 (quoting *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989)); *Valdez v. Mercy Hosp.*, 961 F.2d 1401, 1403 (8th Cir. 1992); *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1390 (8th Cir. 1988). Generally, more than a temporal

connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation. *See Feltmann,* 108 F.3d at 977; *Nelson,* 75 F.3d at 346-47.

Kiel's requests for a TDD were protected communications. Insulting Ms. Fry and indulging in an angry outburst in the presence of co-workers, however, were certainly not, for the ADA confers no right to be rude. Kiel's intervening unprotected conduct eroded any causal connection that was suggested by the temporal proximity of his protected conduct and his termination.

Kiel presented no evidence of conduct or statements that would permit a reasonable jury to find that Select actually fired him because he requested a TDD. Indeed, he had requested a TDD on numerous occasions, but he suffered no adverse employment action until he engaged in abusive, derogatory conduct towards his employer. Kiel did not allege that Select disciplined other employees less harshly for insubordinate conduct. Nor did he show a history of discrimination at Select that would present a genuine factual issue on retaliatory intent. Rather, the record showed that Select has hired a number of deaf employees, has altered job duties to accommodate deaf employees, and has maintained a satisfactory working relationship with deaf employees. In sum, there is simply no evidence from which a reasonable jury could find that Select terminated Kiel in retaliation for his exercising any rights granted to him by the ADA.

Kiel argues that summary judgment was improper because a jury should decide whether his conduct was egregious enough to warrant termination. In the absence of any evidence of discriminatory intent, however, it is not the prerogative of the courts or a jury to sit in judgment of employers' management decisions. *See Montandon,* 116 F.3d at 360. "[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or

fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." *Hutson*, 63 F.3d at 781.

IV.

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *See* 42 U.S.C. § 12111(8)-(9). A reasonable accommodation should provide the disabled individual an equal employment opportunity, including an opportunity to attain the same level of performance, benefits, and privileges that is available to similarly situated employees who are not disabled. *See* 29 C.F.R. § 1630.9 (Appendix) (1998). If more than one accommodation would allow the individual to perform the essential functions of the position, "the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide." *Id.*

Select provided Kiel a reasonable accommodation by restructuring the billing clerk position. Although providing Kiel a TDD would also have constituted an effective accommodation, Select chose to have Kiel's supervisor make the minimal number of client telephone calls that were required. This accommodation allowed Kiel an equal employment opportunity at Select. An interpreter was not required for Kiel to perform the essential functions of his position, and on the one occasion that a training session was relevant to Kiel's position, Select provided him an interpreter. Accordingly, summary judgment was proper on Kiel's failure to accommodate claim.

Because Kiel's claims under the Missouri Human Rights Act are premised on the same factual bases as his ADA claims, they must also fail. *See Finley v. Empiregas, Inc.*, 975 F.2d 467, 473

(8th Cir. 1992) (holding that federal employment discrimination decisions are authoritative for claims under the MHRA); *Midstate Oil Co. v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842, 845-46 (Mo. 1984) (en banc) (same).

The judgment is affirmed.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissents.

HEANEY, Circuit Judge, with whom BRIGHT and McMILLIAN, Circuit Judges join, dissenting.

The majority asserts that summary judgment was appropriately granted to Select because Kiel was insubordinate as a matter of law, Select reasonably accommodated Kiel in his job as a matter of law, and that Kiel's claim must fail as a matter of law because it was unsupported by direct evidence. In my view, the majority is wrong in each respect, and this court should reverse the district court's grant of summary judgment and remand for trial. Accordingly, I respectfully dissent.

"Courts have recognized the difficulty in disposing of issues of discriminatory or retaliatory intent at the summary judgment stage: 'Summary judgments should be sparingly used and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion. All the evidence must point one way and be susceptible of no reasonable inferences sustaining the position of the nonmoving party.'" *Davis v. Fleming Companies, Inc.*, 55 F.3d 1369, 1371 (8 th Cir. 1995) (quoting *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8 th Cir.1991)); *see also Gill v. Reorganized Sch. Dist. R-6*, 32 F.3d 376, 378 (8 th Cir.1994) (reviewing summary judgment "with caution in employment discrimination cases . . . because intent is inevitably the central issue"); *Keys v. Lutheran Family & Children's Servs. of Mo.*, 668 F.2d 356, 358 (8 th Cir. 1981) (noting in retaliation case that "where motive, intent and credibility are key factors summary judgment is generally inap-

propriate.") Additionally, the United States Supreme Court has directed that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). Faced with this formidable standard and the record before it, the district court approached the summary judgment motion hearing with caution, stating: "I think if there is a legitimate non-discriminatory reason given [for Kiel's termination], . . . then I think that this is a case that's close for summary judgment. Maybe it could be granted, maybe it should be granted, but if it's not a legitimate non-discriminatory reason, not legitimate, then obviously the case goes to the jury." (Summ. J. Mot. Hr'g Tr. at 40-41.)

The majority finds that legitimate reason by concluding Kiel was insubordinate as a matter of law. *I disagree*. The ADA prohibits discrimination "against any individual because such individual has opposed any act or practice made unlawful by [the ADA]." 42 U.S.C. § 12203(a) (1998). In determining whether an employee was insubordinate, the question is whether the employee's conduct "was so disruptive, excessive, or 'generally inimical to [the] employer's interests . . . as to be beyond the protection'" of the ADA. *Kempcke v. Monsanto Co.*, 132 F.3d 442, 445 (8 th Cir. 1998) (quoting *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 230 (1 st Cir. 1976)); *see also Jennings v. Tinley Park Community*, 796 F.2d 962, 968 (7 th Cir. 1986) (applying a reasonableness test to determine whether "disloyal" conduct could provide a legitimate basis for discharge because "almost every form of opposition to an employment practice is in some sense disloyal" and if "mere 'disloyal' conduct could provide a legitimate basis for discharge, the protection extended by [anti-discrimination statutes] would be severely limited"). In *Payne v. McLemores Wholesale & Retail Stores*, the Fifth Circuit observed that it is part of a defendant's rebuttal case to establish that "the form of plaintiff's opposition was unprotected by the statute." 654 F.2d

1130, 1142 (5th Cir. 1981) (citing *Rosser v. Laborers' Int'l Union, Local 438*, 616 F.2d 221, 223-24 (5th Cir. 1980); *Jeffries v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1035-37 (5 th Cir. 1980); *Hochstadt*, 545 F.2d at 229-34). Courts have required that oppositional employee conduct "be reasonable in light of the circumstances, and have held that 'the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare.'" *Jeffries*, 615 F.2d at 1036 (quoting *Hochstadt*, 545 F.2d at 233).

The majority concedes that Kiel's request for the TDD was protected activity, but concludes that the subsequent comment that Ms. Fry was selfish was unreasonable as a matter of law.[3] Kiel was a good employee who had been with the company for more than two years and had never been subject to formal disciplinary action. On February 17, 1994, Kiel drafted a letter requesting that Mr. Fry provide Select's deaf employees with a TDD. Kiel made copies to show the other deaf employees at Select. After making the copies, he returned to his desk and put the letter in his drawer. Ms. Fry approached Kiel and chastised

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[3] This concession is at odds with the position of Select's counsel at oral argument. Counsel conceded that the content, not the manner, of Kiel's comment constituted insubordination:

> Judge Heaney: [I]s it your position that the result would be the same if he had spoken in a well-modulated voice?
>
> Mr. Gianoulakis: I think very clearly it was the content of what he said that was the problem here. If he had shouted at the president, "This is the best company I've ever worked for, and you're the best president I've ever worked for," I submit to you we wouldn't be here today.

Clearly, counsel's position is not the law. If it were, no deaf person would ever have the right to oppose his employer's denial of a requested reasonable accommodation for the employee's deafness. In my view, counsel's concession alone required that we reverse the district court's grant of summary judgment.

him for making personal copies at the office notwithstanding the fact that she had never told Kiel that he could not use the copy machine for personal documents. (*See* Ms. Fry 9/29/95 Dep. at 9.) Moreover, other employees used the copier for personal use and Select did not have a policy against such use. (*See* Fritz 9/20/95 Dep. at 38; Mr. Fry 9/21/95 Dep. at 16.) February 17, 1994 was the first time Kiel formally requested a TDD, and Ms. Fry admitted that she was not aware that Kiel had approached anyone else with the same request. (*See* Ms. Fry 9/20/95 Dep. at 36.) Ms. Fry refused Kiel's request for a TDD as a reasonable accommodation for his disability, whereupon Kiel stated that she was selfish. Shortly after this exchange, Kiel apologized for his statement, and Ms. Fry accepted his apology. (*See* Kiel 9/20/95 Dep. at 50.)

The majority concludes that Kiel was insubordinate as a matter of law by characterizing Kiel's statement as insulting, angry, and rude. While a jury might agree with this conclusion, the record certainly does not support the view that Kiel's reaction to Ms. Fry was insubordinate as a matter of law. Unlike the majority, I am unwilling to declare that opposing the denial of a reasonable accommodation request by declaring that an employer is selfish is unreasonable as a matter of law.[4] Kiel did not use profanity or engage in any conduct that could be considered unreasonable as a matter of law. The majority ignores the requirement at the summary judgment stage of viewing the evidence and drawing all justifiable inference in Kiel's favor. *See Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 (8 th Cir.), *cert. denied*, 118 S. Ct. 441 (1997). Kiel stated both at the time of the incident and afterward that he did not realize he was shouting. Nonetheless, the majority cites his statement that

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[4] It may be that, in certain cases, the declaration that an employer is selfish can constitute insubordination for the purposes of summary judgment. Nonetheless, I do not believe that to be the case here.

"If I want to shout, I shout," and concludes that he was lying. This conclusion is simply inappropriate. There is no necessary inconsistency in a person, deaf or otherwise, being capable of shouting when they choose to and not realizing that they are shouting on a particular occasion. At the very least, the issue is one for a jury to resolve, not an appellate court without the benefit of live testimony.

The majority also ignores the *Payne* line of cases, which hold that a handicapped employee may only be discharged for seeking a reasonable accommodation when his behavior is so disruptive, excessive, or generally inimical to the employer's interests as to be beyond the protection of the ADA. That is an issue to be determined by the jury, not by the court as a matter of law. Accordingly, I would hold that the district court erred because Select failed to meet its burden of establishing a *legitimate*, nondiscriminatory reason for its decision to terminate Kiel.

The majority also concludes as a matter of law that Select reasonably accommodated Kiel's disability. The majority states that Select did so by eliminating from his job the need to make business phone calls and providing him with an interpreter on one occasion so that he could participate in United Parcel Service training. In my view, the court erred by holding that Kiel had been reasonably accommodated as a matter of law. The record reveals that, as to employee meetings, Kiel was not provided with an interpreter and, arguably therefore, a way to function

meaningfully as an employee.[5] Also, almost immediately after Kiel's termination but prior to this litigation, Fry asked Wendy Sheu to obtain a TDD for its remaining deaf employees. The reasonableness of Kiel's request is illustrated by the fact that Select obtained a TDD shortly after his termination. Unlike the majority, I am unable to draw any conclusions as a matter of law from these facts regarding reasonable accommodation. The question of reasonable accommodation is for a jury to decide, not a court of appeals–even one sitting en banc.

The majority holds that Kiel is incapable of showing pretext because he failed to produce direct evidence that Mr. or Ms. Fry made statements or engaged in conduct reflecting a discriminatory attitude and that such an attitude motivated them to dismiss Kiel. It relies on *Feltmann v. Sieben*, 108 F.3d 970, 975 (8 th Cir. 1997), and *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 345 (8 th Cir. 1996), for this proposition. I believe that the majority is in error

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[5] At the summary judgment motion hearing, Kiel's counsel stated:

> Mr. Kiel testified in his deposition that he didn't know those meetings were going to take place until they called all the employees together to have the meetings. Who did know that the meetings were going to take place? The company knew that they were planning to have a meeting and could have arranged an interpreter to be there, or could have given Mr. Kiel one day's notice and ask him if he wanted an interpreter for the meeting. But to say that Mr. Kiel didn't put in a timely request for an interpreter for meetings that he was not given advance notice were going to take place, is requiring him to be clairvoyant.

(Summary J. Mot. Hr'g. Tr. at 24.) (*See also* Kiel 9/20/95 Dep. at 40 ("I wanted to know what was going on [at the meetings]. I wanted equal treatment."); *id.* at 41 ("I just do my job until someone said go in that room, and I found a group was talking . . . . I asked [Terry Fritz] what was going on . . . . [to which] [s]he shrugged her shoulders. That's her response. That's the only response I got."); *id.* at 41-42 ("Well, if we had a meeting, I would like to be kept informed of what's going on. I'd like to be part of the team."))

in this regard because direct evidence is not the only method for satisfying the fundamental inquiry in this case. The ultimate issue is whether Select intentionally discriminated against Kiel. *See Ryther v. KARE 11*, 108 F.3d 832, 838 (8 th Cir. 1997) (en banc); *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1101 (8 th Cir. 1996); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1334 (8 th Cir. 1996). "The requisite causal connection may be proved circumstantially by proof that the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive." *Roth v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8 th Cir. 1992); *see also Couty v. Dole*, 886 F.2d 147, 148 (8 th Cir. 1989) (including proof that time of discharge closely followed protected activity in prima facie case of retaliatory discharge claim); *Keys*, 668 F.2d at 358 (same). Moreover, Kiel's initial evidence is properly considered in evaluating Select's explanation for its action. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Initial "evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual"). Select is not entitled to summary judgment simply because it declared that Kiel was insubordinate. Rather, the question is whether a reasonable jury could conclude that Select intentionally discriminated against Kiel. In my view, a reasonable jury construing the facts and all reasonable inferences therefrom in the light most favorable to Kiel could conclude that Select intentionally discriminated against Kiel. In this case, Kiel was a good employee who had worked at Select for more than two years and had never been subject to formal disciplinary action. A jury could conclude from the fact that other employees used the office copier for personal items without incurring management's attention that Kiel was held to a different standard. Additionally, Kiel's termination followed on the heels of his vocal opposition to the denied accommodation request. Accordingly, the majority errs by concluding as a matter

of law that Kiel cannot establish a genuine issue of material fact on the issue of pretext.

I have followed the majority in analyzing this case pursuant to *McDonnell Douglas*. I question, however, whether this analysis is appropriate in retaliation cases. I rather believe that the mixed-motive analysis of *Price Waterhouse* should be used in retaliation cases and that summary judgment is inappropriate when motive, intent, and credibility are the central issues. *See Keys*, 668 F.2d at 358.

For the reasons stated above, I would reverse the district court's grant of summary judgment and remand for trial on all claims. Additionally, I would hold that *Price Waterhouse* analysis applies to retaliation claims. Accordingly, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.